# 87-1798

No.

IN THE

# Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
*Petitioner,*

v.

MARSHALL DURBIN FOOD CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

JACK B. PORTERFIELD, JR.
MARK S. BOARDMAN
Porterfield, Scholl, Bainbridge,
Mims & Harper, P.A.
#2 Office Park Circle
P. O. Box 7688-A
Birmingham, AL 35253-7688
(205) 879-5000

*Attorneys for Petitioner:*
*The Equitable Life Assurance*
*Society of the United States*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an assessment of one million dollars in punitive damages violates the Constitution, in particular, the 5th, 8th, and 14th Amendments.

2. Whether Federal Rule of Civil Procedure 9(b) must be followed in complaints alleging fraud, notwithstanding the defendant's right to conduct discovery.

3. Whether ERISA, 29 U.S.C. § 1001, *et seq.*, prohibits the assessment of punitive damages in this case involving an employee insurance plan.

## PARTIES TO THE PROCEEDING

The only two parties to the proceeding are shown in the caption in the case. Subsidiaries of Marshall Durbin Food Corporation include Marshall Durbin Management Company, Inc.; Marshall Durbin Farms, Inc.; Marshall Durbin Company of Jasper, Inc.; Marshall Durbin, Inc.; Marshall Durbin, Tupelo, Inc.; Marshall Durbin, Memphis, Inc.; Marshall Durbin Poultry Company, Inc.; and Agri-Business Supply Company. Subsidiaries and affiliates of The Equitable Life Assurance Society of the United States include The Equitable of Colorado, Inc.; The Equitable of Japan; Equitable Variable Life Insurance Company; Integrity Life Insurance Company; National Integrity Life Insurance Company; Tandem Financial Group, Inc.; Royal Tandem Life Insurance Company; EQUICOR-Equitable HCA Corporation; EQJ Partnership; and Equitable Holding Corporation.

# TABLE OF CONTENTS


*Page*

Questions Presented for Review ..... i

Parties to the Proceeding ..... ii

Table of Contents ..... iii

Table of Authorities ..... iv

Opinions Below ..... 1

Jurisdictional Statement ..... 2

Constitutional Provisions, Statutes and Rule Involved ..... 2

Statement of the Case ..... 2

Reasons for Granting the Writ ..... 4

I. The Assessment of Punitive Damages Is Unconstitutional ..... 4

A. The assessment of punitive damages here violates the Eighth Amendment ..... 4

B. The assessment of punitive damages violate due process afforded by the Fifth and Fourteenth Amendments ..... 6

C. The assessment of punitive damages violates equal protection afforded by the Fourteenth Amendment ..... 10

II. Rule 9(b) Requires Fraud to be Pleaded with Specificity ..... 12

III. The Assessment of Punitive Damages Here is Prohibited by ERISA, 29 U.S.C. § 1001 *et seq.* ..... 15

Conclusion ..... 16

Appendix

U. S. Constitutional Provisions ..... A-1

Federal Statute ..... A-2

Alabama Constitution Provisions ..... A-2

Rule ..... A-3

Lower Court Opinion and Orders ..... A-4

## TABLE OF AUTHORITIES

*Constitutional Provisions and Statutes:* *Page(s)*

U.S. Const. Art. I, § 10 ..... 12

U.S. Const. Amend. V ..... 6

U.S. Const. Amend. VIII ..... 5, 6

U.S. Const. Amend. XIV ..... 6, 10

Ala. Const. Art. I, § 1 ..... 10

Ala. Const. Art. I, § 6 ..... 6, 10

Ala. Const. Art. I, § 15 ..... 4

Ala. Const. Art. I, § 22 ..... 10, 12

29 U.S.C. § 1144 ..... 15

ALA. CODE § 13A-5-12 (Repl. Vol. 1982) ..... 5

ALA. CODE § 13A-9-40, *et seq.* (Repl. Vol. 1982) ..... 5

*Rules:*

Red. R. Civ. P. 9(b) ..... 11, 12, 14, 15

Fed. R. Civ. P. 12(h) ..... 15

*Cases:*

*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) ..... 5

*Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050 (Ala. 1987) ..... 4, 6, 9

*Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), U.S. appeal pending, ..... U.S. ....., 107 S. Ct. 1367 (1987) ..... 6

*Fay v. Parker*, 53 N.H. 342 (1873) ..... 4, 10

*Friedlander v. Nims*, 755 F.2d 810 (11th Cir. 1985) ..... 15

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ..... 8

*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) ..... 11

*Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080 (S.D.N.Y. 1977), *aff'd*, 636 F.2d 1201 (2nd Cir. 1980) ..... 14

TABLE OF AUTHORITIES — (Continued)

*Cases:* *Page(s)*

*Hayduk v. Lanna*, 775 F.2d 441 (1st Cir. 1985) ..... 14

*Jordan v. De George*, 341 U.S. 223 (1951) ..... 11

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) ..... 5

*Killibrew v. Abbott Laboratories*, 359 So. 2d 1275 (La. 1978) ..... 10

*Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) ..... 6

*Maki v. Aluminum Building Products*, 73 Wash. 2d 23, 436 P.2d 186 (1968) ..... 10

*Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States*, 834 F.2d 949 (11th Cir. 1987) ..... 12, 15

*Matthews v. Eldridge*, 424 U.S. 319 (1976) ..... 8, 10

*Mid-America Hotel Corp. v. Bernstein*, 664 F. Supp. 384 (N.D. Ill. 1987) ..... 16

*Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975) ..... 10

*Morrison Assurance Co. v. North American Reinsurance Corp.*, 558 F. Supp. 1324 (N.D. Ala. 1984), *aff'd*, 760 F.2d 279 (11th Cir. 1985) ..... 14

*Murphy v. Hobbs*, 77 Colo. 541, 5 P. 119 (1884) ..... 6, 10

*Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980) ..... 14

*Pereira v. International Basic Economy Corp.*, 95 P.R.R. 28 (1967) ..... 10

*Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939) ..... 10

*Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ....., 107 S. Ct. 1549 (1987) ..... 15

*Robinson v. Allstate Insurance Co.*, 399 So. 2d 288 (Ala. 1981) ..... 14

*Schiller v. Strangis*, 540 F. Supp. 605 (D. Mass. 1982) ..... 10

*Segal v. Gordon*, 467 F.2d 602 (2nd Cir. 1972) ..... 14

TABLE OF AUTHORITIES – (Continued)

*Cases:* *Page(s)*

*Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) ..... 15

*Smith v. Wade*, 461 U.S. 30 (1983) ..... 7, 10, 11

*State Farm Fire & Casualty Co. v. Fincher*, 454 So. 2d 936 (Ala. 1984) ..... 14

*Vratsenes v. N. H. Auto, Inc.*, 289 A.2d 66 (N.H. 1972) ..... 10

*Other Authorities:*

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982) ..... 7, 8, 9

Ford, *The Constitutionality of Punitive Damages*, D. HIRSCH & J. POURIS, THE CASE AGAINST PUNITIVE DAMAGES (Defense Research Institute 1969) ..... 5, 11

Geller & Levy, *The Constitutionality of Punitive Damages*, 73 ABA J. 88 (Dec. 1, 1987) ..... 6

Ghiradi, *The Case Against Punitive Damages*, 8 Forum 411 (1972) ..... 9, 11

J. GHIRADI & J. KIRCHER, 1 PUNITIVE DAMAGES LAW & PRACTICE § 3.06 (1984) ..... 12

Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986) ..... 5, 7

Mooney, *A Proposal to Abolish Exemplary, Punitive and Vindictive Damages*, 10 Neb. St. Bar J. 9 (1961) ..... 12

Schmidt, *The Constitutionality of Punitive Damages: A Challenge for the Judiciary*, For the Defense, Feb. 1985 ..... 11

Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) ..... 8, 9

5 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1297 (Supp. 1986) ..... 14

No.

IN THE

# Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
*Petitioner,*

v.

MARSHALL DURBIN FOOD CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The only written opinion in this case is *Marshall Durbin Food Corp. v. The Equitable Life Assurance Society of the United States*, 834 F.2d 459 (11th Cir. 1987), and is in the Appendix hereto.

## JURISDICTIONAL STATEMENT

The district court judgment was entered on March 20, 1987. The judgment of the court of appeals was entered on December 23, 1987. A timely petition for rehearing was thereafter filed and was denied on January 29, 1988. The Equitable Life Assurance Society of the United States petitions for writ of certiorari pursuant to 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fifth Amendment.

Eighth Amendment.

Fourteenth Amendment.

Article 1, § 10, Contracts Clause.

ERISA, 29 U.S.C. § 1001 *et seq.*, in particular 29 U.S.C. § 1144 (a).

Federal Rule of Civil Procedure 9 (b).

The text of each is set out in the Appendix hereto.

## STATEMENT OF THE CASE

On October 25, 1984, Respondent Marshall Durbin Food Corporation ("Durbin") filed its four count complaint against the Petitioner Equitable Life Assurance Society of the United States ("Equitable") in the United States District Court for the Northern District of Alabama on the basis of the diversity jurisdiction under 28 U.S.C. § 1332.

The facts of the case are set out by the court of appeals decision, but Equitable summarizes them as follows:

Durbin alleged that Equitable owed it a policy dividend when it cancelled its group coverage with Equitable on June 30, 1982. Durbin said that failure to pay the dividend was fraud. Equitable said that, as a mutual company, it could pay dividends only when its Board of Directors declared an unimpaired indivisible surplus and then that the surplus would be distributed only by dividend formula adopted by its Board.

Of the four counts in Durbin's complaint, the first sounded in contract while the others contained conclusionary allegations of fraudulent inducement, misrepresentation of a material fact, bad faith, and willful fraud. Durbin never alleged a tort of concealment or suppression. Court of appeals decision, 834 F.2d at 950-51.

United States District Judge U. W. Clemon overruled Equitable's motion to dismiss, or in the alternative, motion for a more definite statement under Federal Rule of Civil Procedure 9(b) on April 23, 1985. At trial of the case on March 17, 18, and 19, 1987, the trial court overruled two motions for directed verdict by Equitable. The jury's verdict on March 20, 1987, was against Equitable for $46,060.00 in compensatory damages and $1,000,000.00 in punitive damages.

The Eleventh Circuit Court of Appeals denied Equitable's appeal on December 23, 1987, and denied its petition for rehearing on January 29, 1988.

Durbin alleged that a 1976 letter between an employee of Equitable and one of Durbin's employees constituted legal fraud. Durbin's employee who received the letter testified by deposition at trial that he had a clear understanding of the letter; that understanding was the same as presented by Equitable at trial.

Another two Durbin employees testified at trial that they inquired whether a dividend would be paid upon termination, if the termination was not at the end of the policy year. Equitable's employee answered in 1980 that a dividend calculation would be made in accordance with the dividend formula. When the policy was terminated in 1982, Durbin alleges that Equitable used a different formula; Equitable responded that it used its nationwide formula adopted for year 1982. Court of appeals decision, 834 F.2d at 951-52.

In its appeal and petition for rehearing, Equitable raised the issue of the propriety of punitive damages and the excessiveness thereof and questioned the constitutionality of the punitive damages. The court of appeals found that there was sufficient evidence to support a claim for punitive damages; it wrote

no opinion on rehearing regarding the constitutionality of punitive damages. Equitable also appealed because it was "ambushed" at trial since Durbin's complaint did not plead fraud with the particularity required by Federal Rule of Civil Procedure 9(b). The court of appeals held that Equitable's pretrial discovery amounted to notice pleading so as to prevent an ambush. Court of appeals decision, 834 F.2d at 955.

## REASONS FOR GRANTING THE WRIT

A. The issue of the constitutionality of punitive damages is an important question of constitutional law which has not, but should be settled by this Court.

B. The federal courts of appeals have rendered conflicting decisions in applying Federal Rule of Civil Procedure 9(b).

C. National uniformity in the enforcement of ERISA is desirable and necessary to the insurance and pension industries.

## ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT

### I. The assessment of punitive damages is unconstitutional.

#### "Punitive Damages Destroy Every Constitutional Safeguard Within Their Reach." *Fay v. Parker*, 53 N.H. 342, 397 (1873).

*A. The assessment of punitive damages here violates the Eighth Amendment.*

The jury levied one million dollars in punitive damages against Equitable. This one million dollars is excessive. Excessive damages are unconstitutional because they are the imposition of an excessive fine prohibited by the Eighth Amendment. Excessive fines also violate Article I, § 15, of the Alabama Constitution. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1060-61 (Ala. 1987) (Houston, J., concurring).

The Excessive Fines Clause of the Eighth Amendment can be traced to the provision of the Magna Charta's limitations on amercements. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154-56 (1986). Punitive damages in this country have historically been regarded as punishment. *Id.* at 139. An award of punitive damages meets the elements of criminal punishment articulated by Justice Goldberg in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See also* Ford, *The Constitutionality of Punitive Damages*, D. HIRSCH & J. POUROS, THE CASE AGAINST PUNITIVE DAMAGES, at 17 (Defense Research Institute, 1969). Even if punitive damages are considered only a quasi-criminal form of punishment, such punitive damages still are "functionally equivalent to the 'fines' addressed by the eighth amendment and should be subject to constitutional scrutiny on that basis." Jeffries, 72 Va. L. Rev. at 151.

The jury's award of $1,000,000.00 in punitive damages is five hundred times greater than the maximum fine provided in the Alabama Criminal Code for fraudulent practices and business frauds. *Compare* Title 13A, Chapter 9 of the Alabama Criminal Code (defining crimes of fraudulent practice and business frauds) *with* Alabama Code § 13A-5-12 (which sets out fines). Business fraud in Alabama is a Class A or Class B misdemeanor. The Alabama Code also provides in § 13A-5-12 for misdemeanor fines not to exceed double the pecuniary gain to the defendant or loss to the victim. Even assuming pecuniary gain by Equitable of the compensatory damages, using this standard, punitive damages would be limited to $92,120.00, less than ten percent of the punitive damages actually awarded.

The issue of whether punitive damages are impermissible under the Excessive Fines Clause of the Eighth Amendment has also been presented before this Court in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), but the Court reached its decision on other grounds. At that time, the Court noted that the constitutionality of punitive damages under the Eighth Amendment and under the Due Process Clause of the Four-

teenth Amendment were "important issues which, in an appropriate setting, must be resolved." *Id.* at 828-29.

This Court has heard argument on this issue appealed to it from Mississippi in *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), U.S. appeal pending, ..... U.S. ....., 107 S. Ct. 1367 (1987). If the Court's decision finds no jurisdiction, the issue of punitive damages still must be addressed; this case is an appropriate setting. *See* Geller & Levy, *The Constitutionality of Punitive Damages*, 73 ABA J. 88, 88 (Dec. 1, 1987). The Alabama Supreme Court has been watching this Court's examination of the English common law behind the Eighth Amendment. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1059-60 n.1 (Ala. 1987) (Maddox, J., concurring).

*B. The assessment of punitive damages violates due process afforded by the Fifth and Fourteenth Amendments.*

The lack of sufficient standards for the imposition of punitive damage awards in Alabama violates the Fifth and Fourteenth Amendments' due process clause and Article 1, § 6, of the Alabama Constitution. *See Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1061 (Ala. 1981) (Houston, J., concurring). Alabama law permits the levy of punitive damages without the constitutional safeguards afforded a defendant in criminal prosecution. The Colorado Supreme Court declared this wrong in *Murphy v. Hobbs*, 77 Colo. 541, ....., 5 P. 119, 121 (1884):

> It is doubtful if another instance can be found within the whole range of English or American jurisprudence where the distinctions between civil and criminal procedure are so completely ignored. Plaintiff sues for damages arising from the injury done to *himself*. His complaint or declaration is framed with a view to compensation for a purely private wrong. It need not be under oath, and does not inform defendant that he is to be tried for a public offense. The summons makes no mention of punishment; it simply commands defendant to appear and answer in damages for the private injury inflicted upon plaintiff. When the cause

> is called for trial, no issue upon a public criminal charge is fairly presented by the pleadings. A trial and conviction are had, and punishment by fine is inflicted, without indictment or sworn information. The rules of evidence peculiarly applicable in criminal prosecutions are rejected. The doctrine of reasonable doubt is replaced by the rule controlling in civil actions and a mere preponderance in the weight of testimony warrants conviction. Defendant is compelled to testify against himself, and such forced testimony may produce the verdict under which he is punished. . . .
>
> The law fixes a maximum punishment for criminal offenses, and in this state the presiding judge determines the extent thereof, where a discretion is given; but under the rule we are considering the jury are entirely free from control, except through the court's power — always unwillingly exercised — to set aside the verdict; they may, for an offense which is punishable under criminal statutes by $100 fine at most, award as a punishment many times that sum.

Although "due process" never has been and may never be precisely defined, due process requires constant "fundamental fairness." *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-25 (1981). *See also* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152 (1986). Fundamental fairness is violated by the vagueness of the criteria for determining punitive damages and the failure of the law to put all people on notice of what activities will suffer punitive damages. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 76 (1982). The attendant discretion given juries and imprecise instructions to juries providing a "vaguely defined, elastic standard" for the award of punitive damages give "free reign to the biases and prejudices of juries." *Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting). Juries are unfairly allowed to award punitive damages which may bear no reasonable relationship to the actual harm suffered. *Id.*

Our criminal justice system can be said to err on the side of caution, arguably releasing criminals actually guilty of felonies

because the only proof of that guilt is kept from the jury by the exclusionary rule. Civil punitive damages are assessed in opposite fashion. Rather than forego punishment of some guilty parties to prevent from punishing innocent parties, punitive damages are imposed on more of the latter. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 76 (1982).

This Court has never determined that the procedures used in civil punitive damage awards satisfy due process. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 273 (1983). Indeed, punitive damages do not pass muster under the Court's three factors for determining the level of procedural protection required by due process. *Id.* at 276. In *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court identified the three factors as:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or a substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As to the first factor, the jury could have assessed any amount of punitive damages against Equitable without limitation. This clearly affects Equitable's "private interest."

The risk of an erroneous deprivation of the defendant's property is heightened by the jury's ability to "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. . . . [Juries] remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Although Justice Powell's words quoted above dealt with a defamation case, the risk to a defendant in any case involving punitive damages is great. For example, in this case Equitable's corporate representative, Jean Rassel, made an unfortunate comment about chicken farmers in Alabama whose

education perhaps kept them from understanding the 1976 letter. Ms. Rassel tried to explain that she was very protective of such individuals, such as her father, a South Dakota farmer with an eighth grade education. (Transcript at 294). The trial court stated that this comment would be considered by the jury in determining fraud. (Transcript at 394-95). Plaintiff highlighted Ms. Rassel's comment on closing. (Transcript at 608-10). A single inflammatory comment encourages a jury to assess astronomical punitive damages since the jury has no standard by which to govern itself. Passion and prejudice increase the magnitude of this constitutional error. Wheeler, 69 Va. L. Rev. at 285.

The government's interest in punitive damages is that punitive damages supposedly deter intolerable conduct. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1061 (Ala. 1987) (Houston, J., concurring). There is no empirical evidence to support this conclusion, despite in-depth examination. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 77 (1982). After his study, Professor Ellis also concluded that the intuitive arguments that punitive damages do *not* deter intolerable conduct are stronger than those arguments supporting deterrence. *Id.* If there is any deterrent value, compensatory damages alone are sufficient to deter intolerable conduct. Ghiradi, *The Case Against Punitive Damages*, 8 Forum 411, 419 (1972). Few lay people have any knowledge of punitive damages, but are quite aware of criminal sanctions for acts which could also lead to punitive damages. *Id.* Thus, the possibility of criminal action is a further deterrence in the event that the possibility of compensatory damages is insufficient. Besides,

> if the defendant's conduct has not been of such character as to evoke society's criminal sanctions, if the community has not previously seen fit to call for punishment of such acts, then there is clearly no reason why a jury may enact and enforce punitive measures on an ad hoc basis.

*Id.* at 419.

Punishment itself should be left to the criminal justice system, where proper constitutional safeguards are afforded. *Id.* at 424.

The second and third factors articulated in *Matthews* must be weighed against the suggested solution. The unconstitutionality of punitive damages is best solved by elimination of punitive damages. A "significant number" of states prohibit punitive damage awards. *Smith v. Wade,* 461 U.S. 30, 59 (1983), (Rehnquist, J., dissenting). Punitive damages are judicially created and did not exist at common law. *Murphy v. Hobbs,* 77 Colo. 541, ....., 5 P. 119, 122 (1884). The New Hampshire Supreme Court rejected punitive damages in quite colorful language:

> What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence deforming the symmetry of the body of the law.

*Fay v. Parker,* 53 N.H. 342, 382 (1873). Jurisdictions that agree include Louisiana (*Killibrew v. Abbott Laboratories,* 359 So. 2d 1275 (La. 1978)); Massachusetts (*Schiller v. Strangis,* 540 F. Supp. 605 (D. Mass. 1982)); Nebraska (*Miller v. Kingsley,* 194 Neb. 123, 230 N.W.2d 472 (1975)); New Hampshire (*Vratsenes v. N. H. Auto, Inc.,* 112 N.H. 71, 289 A.2d 66 (1972)); Puerto Rico (*Pereira v. International Basic Economy Corp.,* 95 P.R.R. 28 (1967)); and Washington (*Maki v. Aluminum Building Products,* 73 Wash. 2d 23, 436 P.2d 186 (1968)).

*C. The assessment of punitive damages violates equal protection afforded by the Fourteenth Amendment.*

Equal protection is afforded all under the Fourteenth Amendment and Sections 1, 6, and 22 of Article 1 of the Alabama Constitution. *Pickett v. Matthews,* 238 Ala. 542, 192 So. 261 (1939). The jury's award of $1,000,000.00 in punitive damages is, as noted, five hundred times greater than the maximum fine provided in the Alabama Criminal Code for fraudulent practices and business frauds. This denies Equitable equal

protection of the laws. *See* Ghiradi, *The Case Against Punitive Damages,* 8 Forum 411, 419 (1972). There is no rational basis for allowing a jury to assess an unlimited penalty in punitive damages against a civil defendant when the state has seen fit to impose only a moderate criminal penalty for the same type conduct. *See* Ford, *The Constitutionality of Punitive Damages,* D. HIRSCH & J. POURIS, THE CASE AGAINST PUNITIVE DAMAGES, 15, 18 (Defense Research Institute 1969).

In criminal cases, the defendant is constitutionally entitled to learn the specific charges against it prior to trial. The punitive damage award here was unconstitutional because Durbin failed to plead a specific complaint under Federal Rule of Civil Procedure 9(b). Since punitive damages can be awarded for fraud, the complaint must be specific so that the defendant has the opportunity to know what conduct will subject it to penalties. This constitutional standard of specificity is well recognized in criminal statutes but has also been applied by the Court in at least two civil actions: *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966), and *Jordan v. De George,* 341 U.S. 223 (1951). Neither case involved a criminal statute, but both demonstrate application of the vagueness doctrine to the imposition of civil punitive damages. Punitive damages under any circumstances amount to a "Damoclean sword" because punitive damages are assessed in "open-minded, standardless, and unpredictable" fashion. *See Smith v. Wade,* 461 U.S. 30, 89 (1983) (Rehnquist, J., dissenting). Just as criminal punishment must arise from specific conduct prohibited by an unambiguous criminal statute, civil punitive damages, if constitutional, should be awarded only upon a specific complaint. Schmidt, *The Constitutionality of Punitive Damages: A Challenge for the Judiciary,* For the Defense 20, 21 (Feb. 1985).

Historically, punitive damages arose when criminal laws were subject to enforcement by individuals suing for themselves (to obtain part of the penalty as their reward) as well as for the state. When the authority of public officials was expanded to include private enforcement of penal laws and actions such as *qui tam* were abolished, punitive damages, too, should have

been abolished. Mooney, *A Proposal to Abolish Exemplary, Punitive and Vindictive Damages,* 10 Neb. St. Bar J. 9, 9 & n.1 (1961).

Punitive damage assessments also impair contracts by imposing additional, severe obligations. Article 1, Section 10, Clause 1 of the Constitution and Article I, Section 22, of the Alabama Constitution prohibit any law impairing the obligations of contracts. In this case, the parties ceased their contractual arrangement in 1982. In 1986, the jury assessed one million dollars in punitive damages against Equitable. Since the new obligation is an excessive award of punitive damages not assessed by due process and under equal protection of the laws, it is unconstitutional. *See* J. GHIRADI & J. KIRCHER, PUNITIVE DAMAGES: LAW & PRACTICE § 3.06, p. 15 (Cum. Supp. 1987).

## II. Rule 9(b) requires fraud to be pleaded with specificity.

There is a strong division among the circuits as to the enforcement of Federal Rule of Civil Procedure 9(b) in fraud cases. The Eleventh Circuit holds that fraud need not be pleaded with particularity if there is "extensive pretrial discovery" on the fraud claim. *Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States,* 834 F.2d 949, 955 (11th Cir. 1987). On the other hand, the First and Second Circuits, as cited below, require fraud to be pleaded with particularity in the complaint, in accordance with Rule 9(b):

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . .

The trial court erred in failing to require Durbin to plead fraud in Counts Two, Three and Four of its complaint with specificity as required by Federal Rule of Civil Procedure 9(b). Equitable filed a motion to dismiss, or in the alternative, motion for more definite statement on December 21, 1984, stating that Durbin failed to plead fraud with particularity. (Record, Vol. I, p.6). The trial court overruled the motion on

April 23, 1985. Only at trial did Equitable learn what it would be called on to defend itself against.

Durbin did not state the place, the time, or the persons involved in the misrepresentation alleged in Counts Two, Three and Four. Furthermore, Durbin did not specify how the alleged misrepresentation was made, whether it was written or oral, and the contents or substance of the alleged misrepresentation. Durbin failed to identify the formula for calculation of the retrospective premium adjustments which it said was changed. It never alleged what different formula was applied for the retrospective premium adjustment for the final policy period (April 1, 1982, thru June 30, 1982). Durbin did not say what expenditures allegedly were reclassified and what additional expenses allegedly were utilized in this different formula. Durbin failed to specify how the agreement between Durbin and Equitable for retrospective premium payments somehow began to provide for dividend payments or in what form this alleged agreement is preserved. The complaint did not allege and Durbin made no attempt to amend its complaint to allege that the acquisition or investment selection expenses were expenses which caused Durbin to lose a dividend, as Durbin asserted at trial. (Transcript at 197). Further, the complaint did not state Durbin's allegation at trial that the 28% retention was fraudulent.

Durbin also never specified the damage alleged from the alleged fraud, although, immediately prior to trial, it raised its ad damnum to $10,000,000.00. The complaint said Equitable owed Durbin $58,763.00. (Record, Vol. I, pp. 1-4). This figure rose to "at least approximately $60,000.00" in Durbin's position in the pretrial order. (Record, Vol. I, p.44). At trial, this figure became "approximately" $46,000.00 (Transcript at 167), then $46,060.00 from Durbin's attorney. (Transcript at 577). Equitable objected on the record and with its motion in limine to limit calculation of damages. (Record, Vol. I, p.68; Transcript at 574-77). The trial court erred in overruling Equitable's motion and in allowing Durbin to claim the figures above as damages.

Simple technical averments of fraud, such as Durbin's complaint, do not satisfy Rule 9(b). 5 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1297 (Supp. 1986). A fraud complaint is "woefully deficient" if it does not specify conduct and does not attribute that conduct to specific persons. *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 90 F.R.D. 21, 24 (N.D. Ill. 1980). *See also Robinson v. Allstate Insurance Co.*, 399 So. 2d 288, 290 (Ala. 1981). Equitable must be apprised of Durbin's claims to enable it to prepare an effective response and defense. *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985).

Durbin's complaint violates the spirit of Rule 9(b). Fraud is a very serious charge; Rule 9(b) attempts to minimize fraud claims by requiring a plaintiff to put himself on record as to the specific contents of the alleged fraud. This protects defendants from harm to their reputations by general averments. *Segal v. Gordon*, 467 F.2d 602, 607 (2nd Cir. 1972). Rule 9(b) deters allegations of fraud simply to obtain wider discovery or as "a pretext for discovery of unknown wrongs." *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977), *aff'd*, 636 F.2d 1201 (2nd Cir. 1980).

Durbin cannot claim it amended its complaint by the trial testimony. A plaintiff must plead fraud with particularity to advise the defendant "*in advance of trial* exactly what the defendant is called upon to defend against." *Morrison Assurance Co. v. North American Reinsurance Corp.*, 588 F. Supp. 1324, 1329 (N.D. Ala. 1984), *aff'd*, 760 F.2d 279 (11th Cir. 1985) (emphasis supplied by court). Alabama also follows this rule in fraud cases. *State Farm Fire & Casualty Co. v. Fincher*, 454 So. 2d 936 (Ala. 1984).

The complaint did not allege and was never amended after discovery to allege that the acquisition or investment selection expenses were expenses which caused Durbin to lose a dividend, as is the gravamen of plaintiff's expert's testimony at trial. The complaint further did not state the allegation that 28% retention is fraudulent. Rule 9(b) mandates this specificity. The trial court abused its discretion and erred.

The Eleventh Circuit holds that a party waives its rights under Rule 9(b) if it conducts "extensive pre-trial discovery." The Eleventh Circuit takes this position to "harmonize the directives of Rule 9(b) with the broader policy of notice pleading." *Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States*, 834 F.2d 949, 955 (11th Cir. 1987); *Friedlander v. Nims*, 755 F.2d 810, 813 & n.3 (11th Cir. 1985). The Eleventh Circuit fails to consider in this "harmonizing" that Rule 9(b) is an element of notice pleading. Rule 9(b) is and was an integral part of the Federal Rules of Civil Procedure when adopted so as to create notice pleading in federal courts. Since Rule 9(b) is, therefore, part of notice pleading rules, Durbin cannot be said to have met the requirements of notice pleading when it failed to follow Rule 9(b). Nothing in Rule 9(b) states that a party waives its right to the requirements of Rule 9(b) by conducting discovery. There must be a specific rule on such waiver before a party can be said to have waived its rights, such as the waiver found in Federal Rule of Civil Procedure 12(h).

## III. The assessment of punitive damages here is prohibited by ERISA, 29 U.S.C. § 1001 *et seq.*

This case arises from an employer funded employee benefit plan. Durbin served as the employer and as the plan sponsor, and had discretionary control, including the ability to change insurers, which led to this case. Durbin, therefore, was a fiduciary under ERISA. Punitive damages are prohibited under ERISA, including cases arising over interpretation of an insurance policy. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ....., 107 S. Ct. 1549 (1987), interpreting 29 U.S.C. § 1144(a).

In *Dedeaux*, the plaintiff alleged tortious breach of contract just as Durbin alleged in Count One of its complaint. (Record, Vol. I, pp. 1-4). In *Dedeaux* the plaintiff alleged fraud in the inducement, just as in Durbin's Count Two. *Id.*

ERISA's preemption clause is construed in its broadest sense. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). Fraud

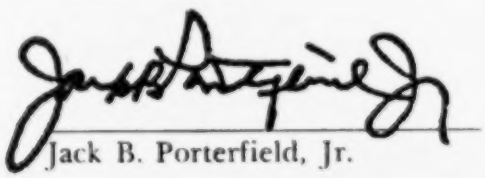
claims "relating to" an employee benefit plan are governed by ERISA. *Mid America Hotel Corp. v. Bernstein*, 664 F. Supp. 384, 385 (N.D. Ill. 1987).

Thus, ERISA prohibits the imposition of punitive damages here because ERISA pre-empts the state tort of fraud pleaded by Durbin. This Court should direct the court of appeals to follow ERISA so as to provide uniform enforcement of that statute nationwide.

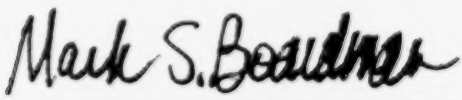
## CONCLUSION

The petition for a writ of certiorari should be granted in order to resolve the constitutionality of punitive damages, the applicability of Federal Rule of Civil Procedure 9(b), and the enforcement of ERISA.

Respectfully submitted,



Jack B. Porterfield, Jr.



Mark S. Boardman
Porterfield, Scholl, Bainbridge,
Mims & Harper, P.A.
# 2 Office Park Circle
Birmingham, AL 35253
(205) 879-5000

*Attorneys for Petitioner,*
*The Equitable Life Assurance*
*Society of the United States*

# APPENDIX

## U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## U. S. CONSTITUTION, AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## U. S. CONSTITUTION, AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## U. S. CONSTITUTION, ARTICLE I, SECTION 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

## EMPLOYMENT RETIREMENT INCOME SECURITY ACT, § 514(a), 29 U.S.C. § 1144(a)

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USC § 1003(a)] and not exempt under section 4(b) [29 USC § 1003(b)]. This section shall take effect on January 1, 1975.

## ALABAMA CONSTITUTION, ARTICLE I, SECTION 1

Sec. 1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

## ALABAMA CONSTITUTION, ARTICLE I, SECTION 6

Sec. 6. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

## ALABAMA CONSTITUTION, ARTICLE I, SECTION 15

That excessive fines shall not be imposed, nor cruel or unusual punishment inflicted.

## ALABAMA CONSTITUTION, ARTICLE I, SECTION 22

That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

## Federal Rule of Civil Procedure 9(b)

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 86-7307

---

D.C. Docket No. 84-2646

MARSHALL DURBIN FOOD CORPORATION,
a corporation,

Plaintiff-Appellee,

versus

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

---

Appeal from the United States District Court for the
Northern District of Alabama

---

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and FORRESTER**, District Judge.

## JUDGMENT

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plain-

---

*See Rule 34-2 (b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable J. Owen Forrester, U. S. District Judge for the Northern District of Georgia, sitting by designation.

tiff-appellee, the costs on appeal, to be taxed by the Clerk of this Court.

Entered: December 23, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ KARLEEN MCNABB
Deputy Clerk

ISSUED AS MANDATE: FEB 9 1988

MARSHALL DURBIN FOOD CORPORATION,
a corporation,
Plaintiff-Appellee,

v.

The EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendant-Appellant.

No. 86-7307.

United States Court of Appeals, Eleventh Circuit.

Dec. 23, 1987.

Jack B. Porterfield, Jr., Mark S. Boardman, Birmingham, Ala., for defendant-appellant.

Frank M. Young, III, Haskell, Slaughter, Young & Lewis, Jonathan H. Waller, Birmingham, Ala., for plaintiff-appellee.

Appeal from the United States District Court For the Northern District of Alabama.

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and FORRESTER,** District Judge.

FAY, Circuit Judge:

This appeal challenges whether there was sufficient evidence of fraud or breach of contract for a reasonable jury to render a verdict awarding actual and punitive damages. The Marshall Durbin Food Corporation ("Durbin") brought a diversity action against the Equitable Life Assurance Society of the United States ("Equitable") for the recovery of surplus insurance premiums allegedly due to Durbin under a retrospective premium agreement. The jury returned a verdict for Durbin. Because we find that the evidence presented was sufficient to support the jury verdict, we affirm.

*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable J. Owen Forrester, U.S. District Court Judge for the Northern District of Georgia, sitting by designation.

## BACKGROUND

Effective January 1, 1976, Equitable issued to Durbin three group policies, including a group health insurance policy. Equitable divided Durbin's group health insurance premium into two basic categories, projected claims and retention. "Projected Claims" represented an estimation by Equitable's actuaries of Durbin's incurred claims for the applicable policy year. "Retention" consisted of monies reserved for Equitable's costs and expenses in handling the claims.

The group health policy included a document known as a retrospective premium adjustment rider ("retro-rider"). Under the retro-rider, when the incurred claims exceeded the projected claims, Durbin would pay Equitable an additional premium to cover the difference.[1] The retro-rider did not specify what would happen if incurred claims were less than projected claims.[2]

Upon obtaining coverage, Durbin inquired whether Equitable would pay a refund if Durbin's actual claims were less than expected. On June 11, 1976, Equitable responded with a letter to Durbin explaining how the retro-rider would operate. It stated that "[i]n the event the claims should be less than 82%, the dividend would be paid to bring your rate up to at least 82%. Of course, all the above is subject to renewal each year on the anniversary date of your policy. . . ."[3]

---

[1]Equitable expressed projected claims and incurred claims as percentages of the billed premium and referred to them as the "objective loss ratio" and the "actual loss ratio" respectively. For example, in policy year 1981 the billed premium was $854,621. The projected claims were $750,357 or 87.8% of the billed premium (the objective loss ratio). Incurred claims totaled $787,853 or 92.2% of the billed premium (the actual loss ratio). In this policy year Durbin paid Equitable a retrospective "pickup" premium to compensate for the excess incurred claims over projected claims.

[2]The relevant section of the retro-rider states: "If on any adjustment date the ratio of such total amount of Billed Premiums is greater than [the objective loss ratio for the applicable policy year], a retrospective premium adjustment shall be due to the Society as of that date. . . ."

[3]Eighty-two percent (82%) was the objective loss ratio for policy year 1976.

At this time, Durbin also asked Equitable for a breakdown of the charges that made up retention. Equitable responded with a letter which itemized first year acquisition expenses of $24,549. Thereafter, Equitable sent Durbin annual breakdowns of the amounts included in retention. Significantly, acquisition expense was not listed on any of these subsequent itemizations until Durbin terminated the policy.

In 1978, Equitable changed the policies' annual anniversary date from January 1 to April 1. The policies continued in effect through the last annual anniversary date of April 1, 1982, and then for a final three month period through June 30, 1982, referred to as the "Final Policy Period."

In policy years 1976, 1977, 1978 and 1981 Durbin's incurred claims exceeded projected claims, and Durbin paid additional retrospective "pickup" premiums to Equitable in those years. In policy years 1979 and 1980, however, incurred claims were less than expected, and Equitable paid Durbin return premiums of $39,415 and $19,201 respectively. Equitable identified these monies as "dividend or retroactive rate refunds."

By September, 1980 Durbin had become dissatisfied with Equitable's insurance program. Durbin asked Equitable whether it would be penalized if it terminated its coverage. Equitable responded that a dividend calculation would be made upon termination and that Durbin would not receive any penalty. Equitable also stated that in the event of termination it would treat Durbin "the same way that [it] had in the past."

Effective June 30, 1982, Durbin terminated its insurance coverage. During the Final Policy Period, Durbin's incurred claims were $51,594 less than the projected claims, but Equitable did not return a surplus premium to Durbin.[4] Instead, in September, 1983 Equitable billed Durbin for a retrospective

[4]Durbin's billed premium during the three month Final Policy Period was $291,342. The objective loss ratio for the 1982 policy year was 87.8% representing projected claims of $255,798 for the three month period. The incurred claims for this period totaled $204,204 or 70.1% of the billed premium. The difference between projected and incurred claims was $51,594.

"pickup" premium of $56,133. Equitable later offered to consider this discrepancy a "wash."

Durbin requested information showing the final figures of the Final Policy Period. In December, 1983 Equitable's responding letter revealed that Equitable charged a total of $81,603 (or 28% of the billed premium) for retention. A breakdown of retention provided in January, 1984 disclosed two extraordinary items – "balance of acquisition expense" in the amount of $20,462 and "investment selection charge" in the amount of $19,722. Equitable refused Durbin's request to refund any premium or dividend.

On October 25, 1984, plaintiff Durbin filed suit against Equitable in the United States District Court for the Northern District of Alabama seeking to recover surplus premiums for the Final Policy Period. Count one alleged that Equitable breached its contract by refusing to pay Durbin a surplus premium due under the health policy's agreed formula for the computation of the retrospective premium adjustment. Count two alleged that Equitable fraudulently represented that it would determine whether a surplus premium is due in the same manner as during previous renewal periods, and that it would refund any surplus premium to Durbin upon termination of the group health policy.

A jury trial commenced on March 17, 1986. On March 20, 1986 the jury returned its verdict for Durbin awarding compensatory damages of $46,060 and punitive damages of $1,000,000.

## DISCUSSION

The principal issue in this appeal is whether there was sufficient evidence presented in the trial court to submit the breach of contract and fraud issues to the jury. When reviewing the sufficiency of the evidence supporting a general jury verdict, we are not free to substitute our judgment for that of the jury. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679 n. 1

(11th Cir.1984). Rather, our inquiry is limited to determining "whether or not reasonable jurors could have concluded as this jury did based upon the evidence presented." *Id.* While making this determination, we are obliged to examine all the evidence and draw reasonable inferences in favor of the party prevailing in the district court. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1019 (5th Cir.1979).

A. Breach of Contract

[1] The trial court did not err in submitting the contract claim to the jury. Equitable asserts here as it did at trial that Durbin is not entitled to a dividend or retroactive rate refund. Equitable claims that it uniformly applies a national dividend formula to determine whether any insured receives a dividend. Accordingly, under the 1982 dividend formula, Durbin was not due a dividend notwithstanding the acquisition or investment selection expenses included in retention.

Durbin, on the other hand, contends that it is entitled to a retroactive rate refund for the Final Policy Period. Durbin claims that Equitable paid it a refund each year in which the actual loss ratio was less than the objective loss ratio, and that the amount of the refund equalled the billed premium minus retention and incurred claims. Durbin further asserts that by fraudulently including the acquisition and investment selection charge included in retention for the Final Policy Period, Equitable prevented it from receiving a dividend.

We disagree with Equitable's position on this issue. Compelling evidence presented at trial showed that the contract between the parties required Equitable to pay Durbin a retroactive rate refund when the actual loss ratio was less than the objective loss ratio.[5] Equitable calculated the dividend or re-

---

[5]Equitable paid Durbin premium refunds or dividends in policy years 1979 and 1980. Durbin paid Equitable retro "pickup" premiums in policy years 1976, 1977, 1978 and 1981. The chart below summarizes yearly premiums retentions and claims:

turn premium paid in policy years 1979 and 1980 in the precise manner Durbin alleges. Specifically, Equitable subtracted incurred claims and retention from the billed premium; the remainder was the dividend or retroactive rate refund.

Further, evidence in the trial court showed that the parties agreed that Equitable's retention charges would not exceed the difference between one hundred percent (100%) of the billed premium and the objective loss ratio stated in the applicable retro-rider agreement. By assessing charges for "balance of acquisition" and "investment selection" in the Final Policy Period, Equitable caused retention to double to approximately 28% of billed premium. Retention charges had never before been more than 13.8% of the billed premium. Because the objective loss ratio for the 1982 policy year was 87.8%, the ratio of retention charges to premium should not have exceeded 12.2% of $291,342 (the billed premium) or $35,543.[6]

There was sufficient evidence such that a reasonable jury could determine that incurred claims during the Final Policy Period were less than projected claims and that Durbin was entitled to a retroactive rate refund. A reasonable jury could find that Equitable treated Durbin differently and penalized Durbin by assessing new and excessive retention charges upon termination.

| | Total Premium | Objective Loss Ratio | Retention | Retention as % of Premium | Incurred Claims | Actual Losses as % of Premium |
|---|---|---|---|---|---|---|
| 1976 | 393,513 | 82.0% | 52,128 | 13.2% | 371,771 | 94.4% |
| 1977 | 566,145 | 82.0% | 59,531 | 10.5% | 465,495 | 82.2% |
| 1978 | 472,329 | 82.0% | 48,783 | 10.3% | 402,682 | 85.25% |
| 1979 | 500,420 | 85.2% | 52,550 | 10.5% | 402,011 | 80.3% |
| 1980 | 507,125 | 85.2% | 54,796 | 10.8% | 416,867 | 82.2% |
| 1981 | 854,621 | 87.8% | 99,570 | 11.6% | 787,853 | 92.2% |
| Final Policy Period | 291,342 | 87.8% | 81,603 | 28.0% | 204,204 | 70.1% |

[6]We note that in calculating its damages Durbin did not use the same method of calculating the retroactive rate refund as Equitable used in policy years 1979 and 1980. Instead, Durbin subtracted the maximum allowable retention (12.2% of the billed premium) of $35,543 from the actual retention of $81,603 leaving a difference of $46,060 in damages. We view this method as equally acceptable.

B. Fraud

[2] The trial court did not err in submitting the fraud claim to the jury. This Court has recognized that the elements of a cause of action for fraud under Alabama law are as follows:

> (a) a false representation concerning an existing material fact; (b) a representation which (1) the defendant knew was false when made, or (2) was made recklessly and without regard to its truth or falsity, or (3) was made by telling plaintiff that defendant had knowledge that the representation was true while not having such knowledge; (c) reliance by the plaintiff on the representation and that he was deceived by it; (d) reliance which was justified under the circumstances; (e) damage to the plaintiff proximately resulting from his reliance.

*First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1313 (5th Cir.1977) (citations omitted), *cert. denied*, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978); *see also Neff v. Kehoe*, 708 F.2d 639, 642 (11th Cir.1983) (per curiam). To recover for fraud under Alabama law, which governs the substantive aspects of this diversity case, the plaintiff must establish that Equitable represented that it would calculate the dividend with respect to the Final Policy Period in the same manner as it had in the past, and that such promise was made with the present intent not to perform. *See Williams v. United Insurance Company of America*, 634 F.2d 813, 815 (5th Cir. Unit B 1981).[7] After careful review of the record, we believe that, at trial, Durbin presented sufficient evidence of actionable fraud by Equitable to satisfy each of the requisite elements for a fraud claim under Alabama law.

The evidence showed that Equitable's representations regarding retention charges and refund of premium were material. Misrepresentations relating to the price of a product or service can be material. *See Village Toyota Co. v. Stewart*, 433 So.2d

---

[7]The holdings of Unit B of the Fifth Circuit bind the Eleventh Circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

1150, 1154 (Ala.1983) (per curiam). The misrepresentations upon which Durbin based its claims all related to Durbin's ultimate cost of purchasing group health insurance from Equitable. Because these false representations directly affected the price of insurance, they were material.

Evidence admitted at trial showed that Equitable knowingly made false representations. This Court recently recognized that under Alabama law an intent to deceive may be inferred from a showing that representations were made wilfully, recklessly or mistakenly. *Neff*, 708 F.2d at 642. Equitable expressly agreed that upon termination it would neither penalize nor treat Durbin differently than it had in the past. After charging Durbin for acquisition expenses in the first year, Equitable secretly accrued annual acquisition expenses on its books. Equitable never included such charges in its breakdowns of retention until the Final Policy Period.

When queried at trial about Equitable's motive and intent in concealing the deferred acquisition charges, Fred Bicknese, the Equitable underwriting manager responsible for Durbin's account, admitted that Equitable deferred these charges because disclosing all of them in the first year, "wouldn't paint us in a very favorable light." Equitable deferred substantial amounts of acquisition expenses, and later penalized Durbin by assessing those expenses only when Durbin terminated its policies. Contrary to its representation, Equitable knew that it would charge Durbin extraordinary expenses, and therefore, would not treat Durbin the same upon termination as it had at renewal. Clearer evidence of fraudulent intent is difficult to imagine.

The evidence at trial showed that Durbin reasonably relied upon Equitable's representations and that these false representations proximately caused Durbin's damages. We find that there was sufficient evidence presented in the trial court such that a reasonable jury could determine that Equitable committed an actionable fraud upon Durbin.

C. Other Issues Presented

Equitable asserts that the court erred in submitted both contract and tort claims to the jury. We disagree. Alabama law is clear that where the plaintiff does not seek to rescind a contract based upon fraud, but rather sues for breach of contract and fraud by the defendant in performing the contract, then both the contract and tort claims are proper for submission to the jury. *See Herring v. Prestwood*, 414 So.2d 52, 57-58 (Ala. 1982).

[3] Equitable argues that Durbin presented insufficient evidence to support a claim for punitive damages. It asserts that to support such a claim, Durbin must not only show that the alleged misrepresentation was committed with the intent to deceive, but that it was also gross, malicious and oppressive. Equitable is incorrect. Proof of intent to deceive alone is sufficient. *Washington National Insurance Co. v. Strickland*, 491 So.2d 872, 876 (Ala.1985); *American Honda Motor Co. v. Boyd*, 475 So.2d 835, 838-39 (Ala.1985). "[E]vidence of gross, malicious, or oppressive conduct need not be found before a jury can impose punitive damages. All that is necessary is that there be evidence to establish an intent to deceive or defraud on the part of the defendant." *Washington National*, 491 So.2d at 876. The evidence presented at trial was sufficient to establish Equitable's intent to deceive, thus supporting Durbin's claim for punitive damages.

Equitable next claims that the trial court erred in allowing an expert witness, Ron Collins, to testify on behalf of Durbin. We disagree. Prior to trial, Equitable filed a motion *in limine* seeking to exclude Collins' testimony or, in the alternative allowing Equitable to depose Collins and then present its own expert. The court granted the alternative relief requested by Equitable. Equitable deposed Collins then offered as an expert, Daniel McCarthy, who testified at length by deposition introduced at trial. The ruling of the trial court was proper, Equitable was afforded the opportunity to present expert testimony and we find no error.

Equitable then complains that it should have been allowed to further qualify Jean Rassel, its company representative at trial. The trial court, in the exercise of its discretion, properly limited testimony as to Rassel's qualifications. Federal Rule of Evidence 104 specifically provides that preliminary questions concerning the qualifications of a person to be a witness are properly determined by the trial court. The advisory committee's note to this Rule explains: "To the extent that these inquiries [regarding qualification of a person to be a witness] are factual, the judge acts as the trier of fact." Federal Rule of Evidence 611 provides the trial court with the authority to reasonably control interrogation of witnesses. This is all that the trial court did with respect to Rassel. Moreover, this limitation was proper because Equitable sought to offer Rassel as an expert, although Equitable had failed to previously identify her as such. Upon timely objection by Durbin, the court properly refused to allow Equitable to present Rassel as an expert. We find no abuse of discretion.

Finally, Equitable claims that it was "ambushed" at trial because Durbin's complaint did not plead fraud with particularity as required by Fed.R.Civ.P. 9(b). This claim is without merit because Equitable obtained extensive pretrial discovery dealing with Durbin's fraud claim. Further, the Pretrial Order specifically described the fraud claim. Indeed, the record shows that the trial court overruled plaintiff's motion to amend its complaint. When viewed in light of our limited standard of review, we cannot say that the district court abused its discretion by not requiring an amended complaint from the plaintiff. *Cf. Friedlander v. Nims*, 755 F.2d 810, 813 n. 3 (11th Cir. 1985) (directing courts to "harmonize the directives of rule 9(b) with the broader policy of notice pleading"). The parties were well aware of the issues involved including Durbin's claim of fraud.

## D. Conclusion

In sum, we find that the trial court did not err in submitting

breach of contract or fraud claims to the jury. We hold that there was sufficient evidence presented for a reasonable jury to conclude as this jury did.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

NO. 86-7307

---

MARSHALL DURBIN FOOD CORPORATION,

Plaintiff-Appellee,

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Northern District of Alabama

---

(JANUARY 29, 1988)

Before FAY, Circuit Judge, HENDERSON, Senior Circuit Judge, and FORRESTER*, District Judge.

PER CURIAM:

Appellant's petition for rehearing is denied.

ENTERED FOR THE COURT.

/s/ PETER T. FAY

United States Circuit Judge

---

*Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| MARSHALL DURBIN FOOD CORPORATION, | ) | |
| Plaintiff, | ) | |
| VS. | ) | CIVIL ACTION |
| | ) | NO. CV 84-C-2646-S |
| THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, | ) | |
| Defendant. | ) | |

Jury Verdict of March 20, 1986

"We, the jury, find in favor of the plaintiff Marshall Durbin Food Corporation, a corporation and against the defendant The Equitable Life Assurance Society of the United States and award compensatory damages in the amount of $46,060.00 and punitive damages in the amount of $1,000,000. Plus 6% interest due from August 1, 1983 to present date (compensatory only).

Record, Vol. I.

Entry of Judgment

Clerk's Court Minutes that plff Marshall Durbin Food Corp have & recover of deft The Equitable Life Assurance Society of the United States the sum of $1,046,060.00 in accord with verdict of jury this day filed as follows: "We, the jury, find in favor of the plff Marshall Durbin Food Corp., a corporation and against the deft The Equitable Life Assurance Society of the United States and award compensatory damages in the amount of $46,060.00 and punitive damages in the amount of

$1,000,000.00 plus 6% interest due from 8/1/83 to present date (compensatory only)"; and taxing costs against deft; further that deft pay direct to attys of record for plff the proceeds of judgment and costs recovered by plff and upon receipt thereof, plff's atts will satisfy said judgment, filed; Entered 3/20/86.

Record, Vol. I at 78.